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JURISDICTIONAL STATEMENT

This appeal is from a Judgment and Order of the Juvenile Court of Greene County, Missouri, terminating the parental rights of Appellant in, to, and over H.L.L., a minor child under seventeen years of age.

On April 8, 2005, the Missouri Court of Appeals, Southern District issued its opinion affirming the decision of the trial court.

On June 21, 2005 this Court, upon application of Appellant for transfer, sustained said application and transferred the above-entitled cause.

STATEMENT OF FACTS

This is an appeal by the father, T.L., from an Order of the Juvenile Court of Greene County, Missouri in Case Number 103JU0512, terminating the parental rights of Appellant, in, to and over H.L.L., dated April 27, 2004. (LF 15). Inasmuch as Appellant, in his Point Relied On, does not challenge the sufficiency of the evidence supporting the Court's findings, Appellant will not comment on the specific substantive evidence presented other than to state that the Respondent presented clear, cogent and convincing evidence that Appellant had subjected the child to inappropriate sexual contact and had provided an overly sexualized home environment characterized by the presence of pornography, along with sexual conversations and activities taking place in the presence of the child. (LF 33). Additionally the Juvenile Office presented clear, cogent and convincing evidence to support the Court's finding that Appellant had neglected the minor child. (LF 33-34). Finally, clear, cogent and convincing was presented that the Appellant was unfit to be a party to the parent

and child relationship because of specific conditions relating to the parent and child relationship, specifically, that that the child suffered from such severe reactions to the father that contact between the Appellant and the child was suspended upon therapist recommendation. (LF 34).

Appellant contends that he was not provided with notice of the hearing and is entitled to a new hearing because of that lack of notice. Accordingly a discussion of the timeline of this cause is necessary.

The Petition to terminate Appellant's parental rights was filed by the Greene County Juvenile Office on October 29, 2003. (LF 5).

On December 9, 2003, summons was issued to the McLennan County Constable for service upon Appellant at the address of 1609 Spring Street, Waco, Texas. (LF 6).

The return of service of summons to Appellant was filed on January 7, 2004, reflecting service on December 30, 2004. (LF 7).

On January 27, 2004, Appellant appeared (it is unknown if in person or by phone) at a Family Support Team Meeting. (Juvenile Office Exhibit 8, page 4).

On March 1, 2004, Deputy Juvenile Office Lisa Altis sent a notice of hearing to Appellant at 1609 Spring Street, Waco Texas, setting forth the March 22, 2004 hearing date. That letter was never returned to the Juvenile Office as having been non-deliverable. (LF 22).

On March 4, 2004 another letter was sent by the Juvenile Office, transmitting to Appellant a copy of the Termination of Parental Rights Social Summary prepared by the State of Missouri Children's Division. The letter and the enclosure were sent to Appellant at 1609 Spring Street, Waco, Texas. That letter was never returned to the Juvenile Office as having been non-deliverable. (LF 22).

On March 22, 2004 the hearing was held on the Petition to terminate Appellant's parental rights. Appellant did not appear at the hearing. (LF 7).

Sometime between March 22, 2004 and April 14, 2004 Appellant contacted the Juvenile Office and requested that an attorney be appointed to assist him. (LF 7).

Appellant by notarized statement of May 26, 2004 informed his attorney that he had been living at 1609 Spring Street, #93, Waco, Texas 76704 and had not received notice of the hearing. (LF 26).

On June 4, 2004, Appellant's attorney, by verified statement indicated that on May 20, 2004 he had mailed Appellant copy of the Motion for New Trial. That correspondence was sent to Appellant at the 1609 Spring Street, # 93, Waco Texas, address. That letter was returned to Appellant's counsel on May 31, 2004 and marked "Return to Sender, Address Unknown". (LF 16).

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN
TERMINATING THE PARENTAL RIGHTS OF
APPELLANT AND APPELLANT WAS NOT
DENIED DUE PROCESS OF LAW BECAUSE
APPELLANT WAS DULY SERVED WITH
SUMMONS AND WAS PROVIDED WITH
WRITTEN NOTICE OF THE TRIAL SETTING.

Crain v. Crain 19 S.W. 3d 170 (Mo. App. 2000)

Bredeman v. Eno, 863 S.W. 2d 24 (Mo. App. 1993)

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S.M.H., 160 S.W. 3d 355 (Mo banc. 2005)

Missouri Rule of Civil Procedure 75.01

Missouri Rule of Civil Procedure 54.22

Missouri Rule of Civil Procedure 54.02

Section 211. 455 RSMo.

Missouri Rule of Civil Procedure 54.20

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF APPELLANT AND APPELLANT WAS NOT DENIED DUE PROCESS OF LAW BECAUSE APPELLANT WAS DULY SERVED WITH SUMMONS AND WAS PROVIDED WITH WRITTEN NOTICE OF THE TRIAL SETTING.

Response to Arguments of Appellant T.L.

Appellant, in his Brief, argues that the Order terminating his parental rights should be reversed in that he was denied due process of law because he was not provided with notice of the March 22, 2004 trial setting.

Appellant does not dispute that he was served with summons and a copy of the Petition as reflected in the Summons. Appellant did not file any type of responsive pleading thereto and was in default. That service took place on December 30, 2003, and the Custodian's Rights Form clearly sets out a parent's rights when a

juvenile action is filed. (LF 39-40). Once properly served, a party who defaults is charged with notice of all subsequent proceedings in the case and is not entitled to additional notice afterwards of the actual date and time of the hearing. **Crain v Crain , 19 S.W. 3d 170, 174 (Mo. App. 2000)** citing **Bredeman v., Eno, 863 S.W. 2d 24, 26 (Mo. App. 1993)**.

Furthermore, the party asserting the invalidity of the judgment has the burden of overcoming the presumption of validity unless the proceedings show that the judgment is not entitled to that presumption. **In Re K.B.P., 625 S.W. 2d 692, 694 (Mo. App. 1981)**.

As noted herein Appellant was served with summons on December 30, 2003. Thereafter, Deputy Juvenile Officer Lisa Altis provided Appellant with notice of the hearing on two separate occasions. Those notices were sent to Appellant at 1609 Spring Street, Waco, Texas, and were not returned by the U.S. Postal Service. (LF 21-22).

Appellant in his affidavit states that as of May 24, 2004 his address was 1609 Spring Street, #93 Waco, Texas (LF 26) yet by affidavit of his attorney correspondence sent to Appellant by him on May 20, 2004 to that address was returned to Appellant's attorney with the envelope marked return to sender, address unknown. (LF 18-20).

Due process requires that the notice provides a party with an opportunity to appear and object and that that as a result of the hearing a judgment could be entered. Whether or not it does so is not to be viewed with the fine distinctions of dictionary definitions and legal arguments but from the standpoint of the recipient. **In Re C.S., 73 S.W. 3d 852, 856 (Mo. App. 2002).** A fundamental requirement of due process is “notice reasonably calculated, under all of the circumstances to apprise interested parties of the pendency of an action and afford them the opportunity to present their objections. **Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306.** Appellant was provided with due process of law. The summons served on December 30, 2003 reflected an

initial hearing date of February 25, 2004 at 9:00 a.m. (LF 39).

The docket sheet reflects that on February 25, 2004, Appellant did not appear. The hearing at that time was set for March 22, 2004.

(LF 7). The summons also stated that if the facts in the Petition are found as true, orders affecting the custodian and the care, custody and control of the child will be made. (LF 40). Thereafter, as noted herein, Appellant was sent written notice of the March 22, 2004 hearing date. (LF 22).

Respondent would respectfully contend that Appellant was provided with notice such that his due process rights were not violated, and would request that the Judgment of trial court be affirmed.

Response to issues raised in Amicus Curia Brief of Legal

Services of Eastern Missouri

A. Rule 75.01 defines the jurisdiction of the trial court post judgment.

Respondent agrees with the contention that Rule 75.01 defines the jurisdiction of the trial court post-judgment. The

language of that rule is permissive in nature in that it states that the trial court retains control over judgments during the thirty-day period after entry of the judgment and **may**, after giving the parties an opportunity to be heard and for good cause, vacate, reopen, correct, amend or modify it's judgment within that time. (Emphasis added). As noted by amicus counsel, reasonable notice is that which is suitable to the case or such notice or information of a fact as may fairly and properly be expected or required in the particular circumstances. **Streett v. Elliott**, 753 S.W.2d 115, 117 (Mo. App. 1988).

In the case at bar, Appellant apparently had some notice of the Court's intent to enter a judgment terminating his parental rights in that while the termination hearing was held on March 22, 2004, the Court's Findings of Fact, Conclusions of Law and Judgment and Order Terminating Parental Rights was not executed until April 27, 2004. (LF 7). On April 14, 2004, almost two weeks prior to the execution of the judgment by the court, counsel was appointed to represent Appellant on appeal. (LF 7). Even

though Appellant claims he did not receive notice of the trial setting, somehow or another, he was able to discover that a trial had been held on March 22, 2004 and that the court intended to enter an order terminating his parental rights.

Between April 14, 2004 and May 21, 2001, Appellant took no action to attempt to reopen the evidence or to challenge service of process which if defective, could have been remedied pursuant to Rule 54.22. The trial court had the opportunity to assess Appellant's involvement with the case both pre-termination and post-termination and, thereafter, denied both of Appellant's motions for new trial. Trial courts are vested with considerable discretion in passing on motions to vacate judgment and motions for new trial and their rulings will not be overturned on appeal unless there has been an abuse of that discretion. **Corzine v. Stoff**, 505 S.W. 2d 162, 164 (Mo. App. 1974). Respondent would respectfully contend that the trial court did not abuse its' discretion in overruling the two motions for new trial filed by Appellant.

B. Service of summons upon Appellant was not improper.

As previously noted herein, Appellant has never directly challenged service in this cause. The issue raised by Appellant does not appear to be that he was never served with summons, but rather that he was not provided notice of the termination of parental rights trial date.

Amicus counsel initially argues that original service was facially defective because the summons did not comport substantially with the requirements of Missouri Supreme Court Rule 54.02 which provides that the summons shall state the time and the place where the party is required to appear and defend and shall notify the party that in case of failure to do so, judgment by default will be entered against the party for the relief demanded in the petition.

The summons issued in the instant cause provided that Appellant was to appear before the court at 1111 N. Robberson, Springfield, Missouri on Wednesday, the 25th day of February, 2004 at 9:00 a.m. for a hearing on the Petition...(LF 39). A review

of the docket sheet however, reflects that the February 25, 2004 date was not the date of the hearing on the Petition to terminate parental rights but rather the mandatory service in compliance hearing date as required by Section 211.455 RSMo., and accordingly no action on the petition could be taken against Appellant. (LF 7). At the service in compliance hearing/meeting, the Court determined that all parties had been served, ordered the Children's Division to prepare a social study and set a trial date of March 22, 2004. (LF 7). Accordingly, the summons did not tell Appellant of the consequences of his failure to appear because there would have been no consequences involved in Appellant's failure to appear at the Section 211.455 meeting.

Amicus counsel next challenges the summons by arguing that Appellant was not informed of what type of action the summons referred to and, therefore, Appellant could not be held to understand what kind of orders may be issued from the Court. The summons issued by the Court reflects that a copy of the Petition to Terminate Parental Rights is attached thereto. (LF 39). That

Petition is clearly denominated “Petition to Terminate Parental Rights”. (LF 41). The requested relief in that petition is clearly set forth in that that petition prays that the Court terminate the parental rights of the mother, of Appellant and of any unknown biological father in, to and over the minor child. (LF 44). Further, the rights form which is part of the summons, informs the parent, inter alia, that they have a right to counsel and that if the court finds the facts in the petition to be true, it may make orders affecting the juvenile and his custodian concerning the care, custody and control of the child. (LF 40). Finally, the Petition to Terminate Parental Rights was a new cause of action assigned Case Number 103JU0512 and the summons was issued with that case number assigned. (LF 39). The underlying neglect case was Greene County Juvenile Court Case Number 102JU0449. Inasmuch as the Petition to Terminate Parental Rights was attached to the summons and had been assigned a new and separate case number, there should have been no confusion as to what action was being taken against the rights of Appellant. Respondent would

respectfully suggest that Appellant could be held to understand what kind of orders may be issued by the court as a result of this action.

Amicus counsel's final attacks on the sufficiency of the out-of-state abode service involve the failure of the deputy sheriff to indicate who the summons was left with at 1609 Spring Street and the failure of the deputy sheriff to make an affidavit before the judge or clerk of the Court of which the affiant is an officer.

As to the issue of who the summons was left with, Amicus counsel cites the case of **O'Hare v. Permenter**, 113 S.W. 3d 287 (Mo. App. 2003). Service was found defective in **O'Hare** not because the individual with whom the summons was left with was not identified by name, but rather because the special process server neglected to state that the person with whom summons was left was over the age of fifteen. **O'Hare** at 289. The court held that unlike a sheriff's return, a special process server's return is not presumed conclusive; it must show on its face that every requirement of the rule has been met and may not be aided by

intendments or presumptions. **O’Hare** at 289. In the instant case, the return executed by the deputy sheriff reflected the summons having been left for Appellant with an individual over the age of fifteen years. (LF 39). See **Ballard v. Ryan**, 646 S.W. 2d 398, 400 (Mo. App. 1983). The address at which that summons was served was the same address provided by Appellant in his letter to his attorney. That letter was marked as Exhibit “A and was attached to Appellant’s second motion for new trial. (LF 26).

Appellant also argues that service was defective because there was no indication on the summons that the officer serving the summons, pursuant to Rule 54.20, made an affidavit before the clerk or judge of the court of which the affiant is an officer. The summons reflects that on December 30, 2003, summons was left at Appellant’s abode with a person over the age of fifteen years by Deputy Albert Manigo, of McLennan County, Pct. 7. (LF 40).

Appellant acknowledges that that the return on the summons does not contain the signature of the Judge or Clerk of that county.

Respondent would respectfully contend, however, that attacks on

these alleged defects have been waived and the court properly proceeded on in the termination of parental rights cause. Defects in the return of service may be waived if they are not raised in a timely manner and if so waived cannot now be considered in a determination of whether a the trial court properly exercised personal jurisdiction. **Tinnon v. Mueller**, 846 S.W. 2d 752, 755 (Mo. App. 1993). Until the matter was raised in the brief filed by amicus counsel, no mention of any alleged defects in the summons or service of that summons was made. At no point has Appellant ever alleged that he did not receive service of summons or the Petition to terminate parental rights. Rather Appellant contends that he did not receive notice of the March 22, 2004 hearing. Respondent would respectfully contend that any alleged defects in service have been waived by Appellant.

Amicus counsel's final point suggests that guidance is needed interfacing **S.M.H.** , with the juvenile courts. Respondent would respectfully disagree in that, other than being a termination of parental rights action, the instant case bears little resemblance to

S.M.H., 160 S.W. 3d 355 (Mo. Banc 2005). In the case before this Court, the petition to terminate parental rights was prosecuted as an independent action. The original dependency petition involving the minor child was filed in 2002 in Greene County Juvenile Court Case Number 102JU0449. (TR 2). On October 29, 2003, the termination of parental rights petition was filed as a new cause of action in Greene County Juvenile Court Case Number 103JU0512. (LF 41). Upon filing of that action, a new summons was issued to, and served upon, Appellant and the other parties involved with the minor child. (LF 39).

CONCLUSION

The Juvenile Office was successful in prosecuting the termination of parental rights action. Appellant was properly served and was provided with notice of the termination hearing in a timely manner. The trial court did not abuse its discretion by not setting aside its judgment. Additionally, there was sufficient evidence to support the findings of the trial court. Accordingly, the judgment of the trial court should be affirmed.

Bill Prince #31384
Attorney for Respondent

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that two copies and one computer diskette of the foregoing Substituted Brief of Respondent, Juvenile Officer were mailed postage pre-paid U.S. Mail, this ____day of August, 2005, to:

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 3571 words, was typed in Word, and that the diskettes provided this Court and counsel have been scanned for viruses and are virus free.

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